BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	
	)	
METROPOLITAN NASHVILLE	)	
PUBLIC SCHOOL SYSTEM,	)	
	)	
Petitioner,	)	
	)	**NO. 03-16**
VS.	)	
	)	
[redacted],	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND FINAL ORDER

JOHN W. CLEVELAND
Administrative Law Judge
TENNESSEE DEPARTMENT OF EDUCATION
120 W. Morris Street
Sweetwater, Tennessee 37874
Phone: 423/ 337-2111

June 10, 2003

MEMORANDUM OPINION
No. 03-16

This cause came to be heard on April 30, 2003, before the Honorable John W. Cleveland, Administrative Law Judge for the Tennessee Department of Education, upon the Due Process Hearing Request filed by the Parent, the testimony of witnesses and the exhibits filed by the parties. The School System and Parent were present, but only the School System was represented by counsel.

Identifying information appears on the cover page of this Opinion and on the Final Order, which incorporates this Opinion and is filed with this Opinion. To preserve the parties' privacy in compliance with the Federal Educational Right to Privacy Act ("FERPA")[1], the parties, the schools, the witnesses and other identifying information are referred to by general descriptions, *e.g.*, the or this "Student," the "School System." Publication of the cover page of this Memorandum Opinion and Final Order, the Final Order or other identifying information violates federal law.

References to the record of the due process hearing in this matter appear in endnotes, *i.e.*, Exhibit 3, Transcript 69, which do not contain identifying information, and may be published with this Memorandum Opinion, in the user's discretion.

PROCEDURAL HISTORY

This due process hearing arises from a request by the School System that the Student's Mother consent to an initial evaluation to determine whether the Student qualifies for special education and related services pursuant to 34 C.F.R. §300.505(a)(1)(i), which provides that "Subject to paragraphs (a)(3), (b) and (c) of this section, informed parent consent must be obtained before ... conducting an initial evaluation ...."[2]

The Student's Mother did not consent to an evaluation. The School System filed a due process hearing request pursuant to 34 C.F.R. §300.505(b), which provides that "If the parents of a child with a disability refuse consent for initial evaluation ..., the agency may continue to pursue those evaluations by using the due process procedures ...." [3]

FINDINGS OF FACT

The Student progressed from grade to grade on schedule at the six schools he attended in the school district. His attendance was not good, with gaps of non-attendance between school transfers.[4] When the Student transferred to his present school n the school district, he was placed in the fourth grade. In spite of excellent attendance at his present school, the Student failed every subject.[5]

The Student consulted a psychologist at the Dede Wallace Center on August 15, 2002. The psychological report diagnosed depressive disorder, not otherwise specified, and recommended that attention deficit hyperactive disorder and adjustment disorder with depressed mood should be ruled out.

A School System psychologist reviewed the Student's academic records and concluded that the School System should begin educational screening to determine the Student's level of reading, writing and math.[6]

An S-Team meeting was convened on January 15, 2003, to discuss what interventions might be appropriate to help the Student. The S-Team discussion lead to consideration of an initial evaluation to determine whether the Student's academic progress is consistent with his ability or whether his difficulty learning was caused by a disability, environmental factors or other causes.[7] The Student's Mother did not consent to an initial evaluation.

Another S-Team meeting was convened on February 26, 2003. The Student's Mother did not attend this meeting. The consensus reached at this S-Team meeting included a recommendation for a full comprehensive psychological assessment to determine the Student's educational needs.[8]

A School System speech pathologist screening determined that the Student was capable of reading and language skills only on the second grade level.[9] The speech pathologist concluded that further assessment was warranted for a full initial evaluation of the causes of the Student's reading and language problems.[10]

CONCLUSIONS OF LAW

Introduction

The Individuals with Disabilities Education Act ("IDEA")[11] requires that Tennessee, as a recipient of federal assistance thereunder, ensure that each disabled student in the state receive a "free appropriate public education."[12] IDEA mandates that participating states provide such education for all children "regardless of the severity of their handicap."[13] In pertinent part, the Act defines a free appropriate public education as:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, ... and (D) are provided in conformity with the individualized education program ....[14]

The term "related services" includes "such developmental, corrective and other supportive services ... as may be required to assist a handicapped child to benefit from special education...."[15] Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (IEP).[16] The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive.[17] An IEP is "more than a mere exercise in public relations;"[18] indeed, it is the "centerpiece of the statute's education delivery system for disabled children."[19]

Evaluation

The substantive requirement that local education agencies (hereinafter "LEA") evaluate children who may be qualified for special education and related services primarily set out in the child-find requirement[20] and the evaluation requirement of IDEA.[21]

20 U.S.C.A. §1412(a)(3)(A) requires that all children with disabilities, and who are in need of special education and related services, must be evaluated, and 20 U.S.C.A. §1414(a)(1)(A) requires LEAs to conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability under IDEA.

20 U.S.C.A. §1414(a)(1)(B) requires that the procedures implementing this substantive requirement for initial evaluation consist of procedures to determine whether a child is a child with a disability as defined in IDEA and to determine the educational needs of such child.

20 U.S.C.A. §1414(a)(1)(c)(i) requires an LEA that proposes an initial evaluation to obtain an informed consent from the parent of such child before the evaluation is conducted; however, subsection (ii) provides that if the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the due process procedures under 20 U.S.C.A. §1415, except to the extent inconsistent with State law relating to parental consent.

State law relating to parental consent is not inconsistent with 20 U.S.C.A. §1415, and in fact, federal and state law relating to parental consent provides the parties with only procedural rights to a due process hearing. Briefly summarized these statutes and regulations provide that:

(1) the LEA must evaluate all children who are disabled within the meaning of IDEA, and the LEA must obtain the parent's consent to the initial evaluation, which the parent may refuse;

(2) the local education agency is not authorized to evaluate children who are not disabled within the meaning of IDEA, and presumably the parent would refuse consent to an initial evaluation of such a child; and

(3) both the LEA and the parent are entitled to a due process hearing if they disagree with the decision of the LEA to conduct an initial evaluation or the parent's refusal to consent to the initial evaluation.

None of the federal or state statutes or regulations to parental consent for an initial evaluation contain any substantive provisions to determine whether, and on what basis, to override a parent's refusal to consent to an initial evaluation. The basis on which the parent's refusal of an initial evaluation may be overridden may be so obvious that it goes without saying. Be that as it may, it should be stated clearly to avoid any misunderstanding, particularly since there do not appear to be any state education agency decisions or court decisions related to initial evaluation. (Most disputes relate to initial placement.)

Considering all the foregoing sections of IDEA together, the conclusion is inescapable that the issue on which the petitioner in a due process hearing related to an initial evaluation carries the burden of proof is whether - or not, depending on which party is the petitioner - factual evidence exists to establish a reasonable suspicion that the child may be disabled within the meaning of IDEA.

In this due process hearing, the Student's Mother appears to be primarily concerned that the Student not be labeled "disabled" or sent to resource class.[22] Her concern is genuine and appropriate; however, it is premature. The School System does not propose to label the Student or send the Student to any particular class or school environment. Certification as eligible for special education and/or related services and assignment of the Student to a special education program would be a "placement," to which the parent again has the right to refuse consent (which may or may not be overridden).

There is abundant evidence in the Student's educational record to establish a reasonable suspicion that the Student may be disabled within the meaning of IDEA.

CONCLUSION

The School System may, without the consent of the Student's Mother, conduct an initial evaluation to determine whether the Student is disabled within the meaning of IDEA and to determine the Student's educational needs.

JOHN W. CLEVELAND
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Memorandum Opinion and Final Order filed in this case were served upon all adverse parties at interest in this case or their counsel of record by placing a true copy of same in the United States Mail, addressed to said parties or their counsel at their offices, with sufficient postage thereon to carry the same to its destination, *to-wit*: [redacted], [redacted], [redacted], Nashville, Tennessee 37203, and Mary E. Johnston, *Esq.*, Department of Law, 2601 Bransford Avenue, Nashville, Tennessee 37204, on June 10, 2003.

JOHN W. CLEVELAND
Administrative Law Judge

ENDNOTES

No. 03-16

1. 20 U.S.C. §1232(g).

2. *See, Tenn.Comp.R.&Regs.* Rule 1520-1-0-.14(5)(d).

3. *See*, 20 U.S.C. 1415(b)(3); 1414(a)(1)(C) and (c)(3).

4. R. 55.

5. R. 18, Exh. 1, pg. 14.

6. R. 54, Exh. 1, pg. 11.

7. R. 14.

8. R. 55, Exh. 30-34.

9. R. 9 and R. 45-49, Exh. 1, pgs. 44-47.

10. R. 48, Exh. 1, pg. 48.

11. *The Act has been amended and reauthorized since its initial enactment in 1970. This Opinion refers to the original Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 and all of its amendments, as well as the re-authorization as the Individuals with Disabilities Education Act (IDEA-97), as IDEA.*

12. 20 U.S.C. §1412(1).

13. 20 U.S.C. §1412(2)(C).

14. 20 U.S.C. § 1401(18).

15. 20 U.S.C. §1401(17).

16. 20 U.S.C. §1401(16).

17. 20 U.S.C. §§1401(19) (defining IEP), §1414(a)(5) (requiring an IEP).

18. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1570 (11th Cir. 1983), vacated in part on other grounds, 468 U.S. 1213, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1983), reinstated in relevant part, 740 F.2d 902 (1984), cert. denied, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985).

19. *Honig v. Doe*, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

20. 20 U.S.C.A. §1412(a)(3)(A), 34 C.F.R. §300.125.

21. 20 U.S.C.A. §1414(a)(1)(A), 34 C.F.R. §300.504.

22. R. 25-28.

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METROPOLITAN NASHVILLE	)	
PUBLIC SCHOOL SYSTEM,	)	
Petitioner,	)	NO. 03-16
VS.	)	
[redacted],	)	
Respondent.	)	

FINAL ORDER

This case came to be heard by telephone conference on April 30, 2003, before John W. Cleveland, Administrative Law Judge, on the Petitioners' due process hearing request, the testimony of witnesses, the exhibits filed by the parties and the record as a whole, from all of which the Administrative Law Judge makes the findings of fact and reaches the conclusions of law set forth in his Memorandum Opinion, which is filed herewith and incorporated herein by reference as fully and completely as if set forth verbatim.

IT IS THEREFORE ORDERED as follows:

1. The School System shall conduct an initial evaluation to determine whether the Student is disabled within the meaning of IDEA and to determine the Student's educational needs in accordance with *Tenn.Comp.R.&Regs.* Rule 1520-1-0-.05(12).

2. Within sixty (60) days from the date of this Order, the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this Order.

ENTER this 10th day of June, 2003.

JOHN W. CLEVELAND
Administrative Law Judge

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of entry of this Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court under provisions of *Tenn.CodeAnno.* §49-10-601.